Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOSEPH H. NORWOOD, individually and as representative of a class of citizens;

Respondent,

v.

W.C. BAIN, JR. individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; and CITY OF SPARTANBURG,

Petitioners.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the searches of motorcycle saddlebags and unworn clothing that are conducted in response to a real and substantial threat to the public safety fall within the "special needs" exception to the warrant requirement.

II. Whether the chief policymaker who directed the searches of motorcycle saddlebags and unworn clothing is entitled to qualified immunity where there was no case law in existence holding that the searches were unconstitutional and where distinguished judges cannot even agree as to the unconstitutionality of those searches.

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District Court Order is Unpublished.

STATEMENT OF JURISDICTIONAL BASIS

A three-judge panel of the Fourth Circuit Court of Appeals issued its 2-1 decision on May 13, 1998. A petition for rehearing was subsequently filed with a suggestion for rehearing *en banc*. That petition was granted. The *en banc* court issued its decision on January 8, 1999.

The United States Supreme Court has jurisdiction of this appeal pursuant to the provisions of 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The Respondent, Joseph H. Norwood, individually and as a class representative, commenced an action pursuant to 42 U.S.C. § 1983 against the Petitioners, W.C. Bain, Jr. and the City of Spartanburg, alleging the violation of their First and Fourth Amendment rights. In this action, Norwood challenges the constitutionality of various security measures taken by the Spartanburg Department of Public Safety at an American Red Cross sponsored motorcycle rally occurring on September 11, 1994, at the Piedmont Interstate Fairgrounds in Spartanburg, South Carolina.

In May 1994, organizers began preparations for the motorcycle rally scheduled for that September. The Spartanburg Department of Public Safety was requested to assist with security for the event. In the months leading up to the rally, the City, together with the South Carolina Law Enforcement Division (SLED), developed certain intelligence information that indicated the real possibility of an armed confrontation between rival motorcycle gangs at the rally. In particular, it was learned that the Hell's Angels and the Pagans were considering attending the rally. These rival gangs were at that time engaged in a

territorial conflict in South Carolina, and there were previous altercations between these gangs during prior months.

In late August or early September, it was learned from a Virginia State Police intelligence report that the Pagans had ordered a mandatory run to an undisclosed location for Saturday, September 10, 1994, the day before the rally in Spartanburg. The City also received information through SLED that the Hell's Angels would be attending a rally in Cherokee, North Carolina on the same weekend as the Spartanburg rally, and would be attending the Spartanburg rally after leaving North Carolina. Finally, on the evening before the rally, an event organizer advised Chief Bain that 3,000 to 4,000 bikers from the Cherokee rally would be attending the Spartanburg rally.

On the day of the rally, a checkpoint was set up at the gates to the fairgrounds entrance where the motorcycles would enter the fairgrounds. The purpose of the checkpoint was to prevent weapons from entering the fairgrounds. At the checkpoint, the officers examined and videotaped the drivers licenses of the persons entering by motorcycle. In addition, their motorcycle saddlebags and unworn clothing were searched for weapons. The original plan called for the use of hand-held magnetometers to conduct the searches; however, that method proved to be ineffective as a result of the metal on the

motorcycles. As a result, the saddlebags and unworn clothing were visually inspected by the officers. The officers did not conduct searches of worn clothing or search the individuals themselves. The searches lasted no more than one to two minutes. After the search procedures, the bikers were permitted to enter the fairgrounds. The officers were at all times polite and professional.

The checkpoint was visible to those approaching the fairgrounds. In addition, the persons on motorcycles were informed that they could park in an adjoining lot and walk into the fairgrounds without being stopped at the checkpoint.

The Respondent Norwood, on behalf of the class, contends that the inspection of the saddlebags and unworn clothing constituted an unreasonable search in violation of the Fourth Amendment. That issue and others were tried before a jury, but the jury was unable to reach a verdict. The parties agreed to allow the district judge to decide the case on the evidentiary record presented to the jury. The district court found that certain security measures including the videotaping procedure were constitutional, but the court determined that the searches of the saddlebags and unworn clothing was unreasonable due to the lack of individualized reasonable suspicion to conduct the searches. The

district court found that no damages had been proven and declined to award even nominal damages.[1]

The parties filed cross-appeals to the Fourth Circuit Court of Appeals.[2] By a 2-1 vote, the three-judge panel affirmed the decisions of district court, except that the panel ordered the district court to award nominal damages up to one dollar for the Fourth Amendment violation. Like the district court, the three-judge panel denied Chief Bain's qualified immunity defense. Judge Wilkins filed a dissenting opinion on the search and qualified immunity issues.

Bain and the City subsequently filed a petition for rehearing and a suggestion for rehearing *en banc*, which were granted. Argument was held before the *en banc* court consisting of fourteen appellate judges. On January 8, 1999, a decision was issued whereby the court split 7-7 on the search issue and on the qualified immunity issue. As a result, the judgment of the district court was affirmed with respect to those issues.

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[1] The district court had jurisdiction of this action pursuant to the provisions of 28 U.S.C. § 1343.

[2] On August 14, 1996, the Respondent Norwood filed his notice of appeal to the Fourth Circuit Court of Appeals. The Petitioners filed their cross-appeal on August 22, 1996. The Fourth Circuit Court of Appeals exercised jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

ARGUMENTS

I. The search of the saddlebags and unworn clothing conducted as a result of a grave threat to the public safety falls within the "special needs" exception to the warrant requirement.

By the vote of an equally divided *en banc* court, the Fourth Circuit Court of Appeals concluded that the search of saddlebags and unworn clothing prior to entrance to a motorcycle rally, in spite of reliable information that an armed confrontation by rival motorcycle gangs was planned, was in violation of the Fourth Amendment prohibition of unreasonable searches. The Fourth Circuit ruled that the suspicionless search of the bikers' property under the prevailing circumstances did not fall within the "special needs" exception to the warrant requirement. That decision is worthy of review by the United States Supreme Court for several compelling reasons.

First, as will be discussed in more detail below, the Fourth Circuit failed to follow the reasoning of existing decisional law by this Court which would logically extend the "special needs" exception to the facts of this case. Second, the Fourth Circuit decision will tremendously burden the ability of law enforcement to react to grave matters of public safety. Third, there is absolutely no authority in any circuit that presently addresses the extent to which law enforcement

may go when faced with a legitimate threat of harm to a large number of the general public. This alone is an issue that is deserving of this Court's attention given its repercussions in a society that is becoming more violent and more unpredictable and a society more susceptible to acts of terrorism that threaten the safety of large numbers of people. Finally, this is an issue which requires a resolution by this Court in light of the obvious uncertainty it creates, as evidenced by the lack of a consensus in the Fourth Circuit and the diametrically opposite conclusions drawn by the judges of that court.

The well-reasoned dissent by Judge Wilkins explains best the reasons that this Court needs to grant certiorari in this case. At the very beginning of his dissent, which was joined by six other judges of the evenly divided court, Judge Wilkins writes:

> A conclusion that law enforcement officers cannot, consistent with the Fourth Amendment, attempt to avert a concrete threat of great public harm with a relatively unobtrusive and appropriately effective warrantless search not supported by individualized suspicion and not undertaken for law enforcement purposes creates an unnecessary risk to public safety and is directly contrary to Supreme Court precedent.

As Judge Wilkins aptly notes, certiorari is warranted because of the unnecessary risk to public safety created by the Fourth Circuit decision, a precedent that will impede the efforts of law enforcement

not only within the Fourth Circuit but in all other circuits as well, given the lack of case law in those circuits addressing this issue.

Likewise, Judge Wilkins correctly states that the Fourth Circuit decision is "directly contrary to Supreme Court precedent" which has previously addressed the "special needs" exception in other contexts. It is well settled that a reasonable search must typically be predicated upon probable cause or the lesser standard of reasonable suspicion. However, "neither a warrant nor probable cause, nor indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). In fact, this Court has repeatedly recognized exceptions to the requirement of reasonable suspicion where compelled by "special needs, beyond the normal need for law enforcement." *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 , 619 (1989). The "special needs" have been described as "concerns other than crime detection." *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

In *Skinner*, this Court held:

> In limited circumstances, where the privacy interest implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search

> may be reasonable despite the absence of such suspicion.

Skinner, 489 U.S. at 624. A grave threat to the public safety, consistent with the facts of the present case, constitutes such "an important government interest." In fact, in *Chandler*, *supra*, this Court reasoned that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' -- for example, searches now routine at airports and at entrances to courts and other official buildings." 520 U.S. at 323.

Therefore, in its latest decision to address the "special needs" exception, this Court makes it abundantly clear that the unconstitutionality of the Georgia statute at issue is readily distinguishable from cases where the public safety is in significant jeopardy. The Court even cites to the analogous situations of airport and courthouse searches, even though those examples are not nearly as compelling as the facts of the present case, where a real and definite threat was eminent. The need for a suspicionless search here qualifies as a "special need"; the need went far beyond ordinary crime detection or investigation. The need was the prevention of weapons from entering the fairgrounds, a reasonable response designed to prevent a violent confrontation between rival motorcycle gangs and to safeguard the public.

"When such 'special needs' -- concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314. In his dissent, Judge Wilkins concisely yet eloquently applies the three-prong balancing test to the facts of this case.

Without question, Chief Bain and the City were faced with reliable and substantial intelligence information indicating that an armed confrontation between the Hell's Angels and Pagans was a likely occurrence at a public charitable event to be attended by unsuspecting adults and children. As Judge Wilkins concluded:

> [U]nder the circumstances presented here, a special governmental interest existed in protecting the public. Spartanburg possessed concrete information that armed, rival motorcycle gangs, the members of which could not be identified, planned to attend the rally. And, the potential for the eruption of violence appeared real in light of past altercations between the two groups. Given the large number of participants expected for the rally and the potential for a massive, violent confrontation, Spartanburg clearly possessed a genuine and substantial need to safeguard the public.

Hence, the first prong of the analysis is satisfied, but the analysis does not stop there. It is necessary to also assess the effectiveness of the intrusion (i.e., the search of the saddlebags and

unworn clothing) and the magnitude of that intrusion. *See*, *Michigan Dep't. of State Police v. Sitz*, 496 U.S. 444, 455 (1990). The Petitioners understood through intelligence and training that the motorcycle gang members would carry their weapons in their saddle bags and that they would not separate from their motorcycles. Based on this information, the Petitioners directed their efforts at the bikers who sought to take their motorcycles into the fairgrounds rather than those who parked their motorcycles outside and entered on foot. The search procedures were developed to be the most direct and efficacious method to accomplish the goal of keeping weapons out of the fairgrounds. The plan initially was to use hand-held magnetometers to conduct the searches, a method found permissible in the one reported decision having a similar factual setting. *See*, *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987). That original plan proved ineffective given the metal on the motorcycles. As a result, the manual search procedures were justified and were effective in accomplishing the Petitioners' goal in light of the intelligence information that was guiding their decision-making.

Likewise, the degree of the intrusion, particularly in light of the significant governmental interest, was minimal at best. The searches were brief in duration. The officers were polite, pleasant and

professional, as evidenced by the videotapes submitted into evidence. The officers were not called upon to exercise any discretion; the searches were conducted with regularity and neutrality. Moreover, a reasonable alternative existed. The bikers were not compelled to have their saddlebags searched; they were given the option of parking their motorcycles in a lot located outside the fairgrounds and entering the fairgrounds on foot.

Judge Wilkins summarized the application of the balancing test to the facts of this case:

> In sum, a genuine and substantial threat to public safety existed that created a special need beyond that of the traditional law enforcement goals of apprehension and detection of criminal conduct; the method chosen to address that need effectively advanced the public interest, which could not have been promoted as well by a scheme requiring individualized suspicion or a warrant; and the intrusion suffered by those individuals who submitted to the search was minimal. Therefore, a balancing of these factors clearly demonstrates that the search conducted was reasonable and thus not violative of the Fourth Amendment.

The district court and the evenly divided Fourth Circuit erred in failing to extend the "special needs" exception to a substantial and grave matter of public safety, an area foreseen by this Court in *Chandler*, *supra*, as a logical extension of the "special needs" exception. In fact, the Petitioners submit that circumstances such as

those present here constitute a more worthy "special need" than the drug testing and the school searches and the sobriety checkpoints where the exception has been applied previously with this Court's approval.

Clearly, this Court needs to intervene in this debate to address what action law enforcement may take when faced with a legitimate public safety crisis where the facts do not easily give rise to individualized reasonable suspicion. These situations will arise again, probably more frequently than anyone cares to believe. As the Oklahoma City and the World Trade Center bombings have ably demonstrated, terrorism and other forms of mass violence do occur in the United States. The extension of the "special needs" exception to situations such as what was facing Chief Bain and the City is necessary to allow for the protection of the public. When a search is designed to effectively address a threat to the public safety and does so in a minimally intrusive manner, that search should be held constitutional. To hold otherwise places our law enforcement in the untenable position of being unable to defend against a known threat of grave harm, and it places the general public unnecessarily in that harm's way.

II. W.C. Bain, Jr. is entitled to qualified immunity in that the law governing his actions was not clearly established.

The evenly divided Fourth Circuit Court of Appeals affirmed the district court's denial of qualified immunity for Chief Bain. In so ruling, the Fourth Circuit concluded that a "survey of the legal landscape" that existed in September 1994 clearly reflected that the search procedures implemented by Bain were in violation of the Fourth Amendment.

The error of the Fourth Circuit's ruling is two-fold. First, the "survey of the legal landscape" in September 1994 did not include any case law even remotely on point. The closest case was the Second Circuit decision in *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987), which involved pat-down searches of persons entering a Ku Klux Klan rally. The Second Circuit ruled the pat-down searches to be unconstitutional; however, the court did "allow magnetometer searches of persons and packages at such rallies, followed by frisks where the magnetometer indicates the presence of metal and the situation cannot be resolved by use of the magnetometer alone." 832 F.2d at 1340. The Second Circuit further recognized that "more intrusive measures might

be justified by future events." 832 F.2d at 1341.[3] In the present case, the Petitioners attempted to use hand-held magnetometers to conduct the searches for weapons, but this proved ineffective given the metal of the motorcycles. As a result, an alternative plan was implemented on the scene by conducting minimally intrusive visual inspections of unworn clothing and saddle bags.[4]

The remaining cases cited by the Fourth Circuit as inclusive of the "survey" are cases where the threat to the public safety paled in comparison to the scenario facing Bain and the City. The cases involving searches for alcohol and drugs at sporting events and rock concerts did not clearly establish precedence for what the City was undertaking.[5] It was with this backdrop -- unusual circumstances giving

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[3] It is noteworthy that the Second Circuit in *Wilkinson*, *supra*, ruled that the individual defendants were entitled to qualified immunity.

[4] Significantly, in rejecting Bain's claim of qualified immunity, the Fourth Circuit explained that "Bain's decision was one taken after unhurried deliberation and with ample opportunity for reflection and counsel." That is not entirely accurate with respect to the searches of clothing and saddlebags. The original plan to use magnetometers proved ineffective, and alternative measures were implemented in response. Those alternative measures were not the result of unhurried deliberation.

[5] It should be noted that the stadium cases cited by the Fourth Circuit involved physical searches of persons for drugs or alcohol. In the present case, the searches were limited to unworn

rise to a grave threat to public safety and the lack of clear authority to govern the City's response -- that Chief Bain implemented the search procedures at issue. That scenario warrants qualified immunity for Bain.

Secondly, the Fourth Circuit failed to apply a truly significant and insightful point of law that was observed by Judge Wilkins in his original dissent. In evaluating Bain's entitlement to qualified immunity, this Court should take notice of the obvious difference of opinion among the distinguished judges that have considered the reasonableness of Bain's actions. With the opportunity to assess the situation after the events have unfolded, seven judges of the Fourth Circuit Court of Appeals concluded that the searches of clothing and saddlebags were unreasonable. Seven other judges, however, reached the opposite conclusion and found the search procedures were reasonable. There can be no better evidence that the law that governed Bain's actions was not "clearly established."

If two jurists (or better yet, fourteen jurists) cannot agree on whether the Fourth Amendment was violated in this case, then obviously no "bright line" was transgressed. The concept of qualified

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clothing and saddlebags and for the purpose of detecting weapons, making the searches much less intrusive.

immunity recognizes that it is patently unfair to hold a governmental official liable for monetary damages for violating law that is not clearly established. As the various opinions authored by the Fourth Circuit judges ably demonstrate, the unconstitutionality of Bain's actions relative to the search procedures was not clearly established, and as such, Bain is undoubtedly entitled to qualified immunity.

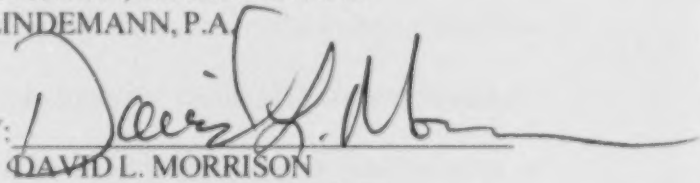
The Petitioners are unaware of any Supreme Court case that sets forth the basic rule that the law cannot be deemed "clearly established" where the reviewing judges, trained and skilled in constitutional law, cannot agree as to whether particular conduct is unconstitutional. In those circumstances, the governmental official under scrutiny is deserving of qualified immunity. No other result would be fair or reasonable. This case gives this Court an excellent forum to state that rule of law, a rule which will receive, in the Petitioners' judgment, frequent application and which will further refine the concept of qualified immunity, thereby upholding the important policy considerations that underlie that defense.

CONCLUSION

Based on the foregoing discussion and analysis, the Petitioners, W.C. Bain, Jr. and the City of Spartanburg, respectfully request that this Court issue a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals with respect to the questions presented herein for review.

Respectfully submitted,

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